

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANETTE NICHOLS LODWICK

Claimant

VS.

RUBBERMAID SPECIALTY PRODUCTS

Respondent

Self-Insured

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Docket No. 204,829

ORDER

Respondent requested Appeals Board review of the October 28, 1997, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on April 10, 1998, in Wichita, Kansas.

APPEARANCES

The claimant appeared by her attorney, Norman I. Cooley of Wichita, Kansas. The respondent, a self-insured, appeared by its attorney, David S. Wooding of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant a 76.5 percent permanent partial disability for the period following her date of accident of July 19, 1994, through August 31, 1995, and a 53 percent permanent partial disability after August 31, 1995. The permanent partial disability award was based on the work disability test contained in K.S.A. 44-510e.

Respondent contends claimant should be limited to the stipulated 7 percent permanent functional impairment reduced by claimant's preexisting permanent functional impairment of 1.75 percent or 5.25 percent. Respondent argues claimant is not entitled to a work disability award because she failed to present credible evidence on permanent restrictions, and further, she retains the capacity to earn a comparable wage.

In contrast, claimant contends the work disability award is supported by the record and should be affirmed. Additionally, the claimant argues the record does not support a reduction in claimant's award of compensation by the alleged amount of claimant's preexisting functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Is claimant entitled to an award based on work disability?

The Appeals Board finds the Administrative Law Judge's Award in regard to claimant's entitlement to a work disability should be affirmed. The Appeals Board does so for the reasons stated in the findings and conclusions expressed in the Administrative Law Judge's Award. Therefore, the Appeals Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein.

Did claimant have a preexisting functional impairment that is required to reduce the award of compensation pursuant to K.S.A. 44-501(c)?

Although the respondent raised the foregoing issue before the Administrative Law Judge, the Administrative Law Judge did not directly address the issue in the Award. The issue was again raised before the Appeals Board and as set forth below will be addressed.

K.S.A. 44-501(c) provides in pertinent part as follows:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The respondent argues any permanent partial disability benefits awarded claimant has to be reduced based on Dr. Phillip R. Mills' opinion that claimant's preexisting 1990 low-back injury contributed 25 percent to claimant's present 7 percent permanent functional impairment rating. Dr. Mills testified this was an estimate based on a review of the medical records of Dr. George Sturich and Dr. Robert L. Eyster who treated claimant for a 1990 low-back injury.

However, the claimant testified and the medical records verified that Dr. Sturich and Dr. Eyster released claimant after her 1990 low-back injury to return to her regular work without permanent restrictions and with no permanent functional impairment rating. Additionally, claimant testified she was able to perform her regular job duties for the respondent, and she remained asymptomatic until the July 19, 1994, accident.

Based on the above facts, the Appeals Board finds that the respondent has failed to prove that claimant had a preexisting functional impairment that is required to reduce her present award of compensation pursuant to K.S.A. 44-501(c).

The Appeals Board has reviewed the Administrative Law Judge's computation of the award. The Appeals Board finds the Administrative Law Judge erred in computing the award. This computation error will be corrected in this order which will change the total award from \$78,467.99 to \$70,362.63.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated October 28, 1997, should be, and is hereby, affirmed except the computation of the award will be corrected as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Janette Nichols Lodwick, and against the respondent, Rubbermaid Specialty Products, a self-insured, for an accidental injury which occurred on July 19, 1994, and based upon an average weekly wage of \$442.73.

The claimant is entitled to 22.29 weeks of temporary total disability compensation at the rate of \$295.17 per week or \$6,579.34, followed by 36 weeks of permanent partial disability compensation at \$295.17 per week or \$10,626.12 for a 76.5% permanent partial disability, followed by 180.09 weeks of permanent partial disability compensation at \$295.17 per week or \$53,157.17 for a 53% permanent partial disability after August 31, 1995, making a total award of \$70,362.63.

As of August 20, 1998, there is due and owing claimant 22.29 weeks of temporary total disability compensation at the rate of \$295.17 per week or \$6,579.34, followed by 36 weeks of permanent partial disability compensation at the rate of \$295.17 per week or \$10,626.12, followed by 155 weeks of permanent partial disability compensation at \$295.17 per week in the sum of \$45,751.35, for a total of \$62,956.81, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$7,405.82 is to be paid for 25.09 weeks at the rate of \$295.17 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders in the Administrative Law Judge's Award.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Norman I. Cooley, Wichita, KS
 David S. Wooding, Wichita, KS
 Nelsonna Potts Barnes, Administrative Law Judge
 Philip S. Harness, Director